IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	**)**	
	)	
Respondent,	**)**	
	)	
vs.	**)**	**No. 83237**
	)	
CARMAN L. DECK,	**)**	
	)	
Appellant.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, MISSOURI
23rd JUDICIAL CIRCUIT, DIVISION 2
THE HONORABLE GARY P. KRAMER, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Carman Deck, incorporates the jurisdictional statement from his original brief.

STATEMENT OF FACTS

Mr. Deck incorporates the statement of facts from his original brief.

POINTS RELIED ON

I. Counsel Did Not Investigate and Present Mitigation

The motion court clearly erred in denying the claim of counsel's ineffectiveness for failing to investigate and to present the circumstances of Carman's life history through witnesses, David Hood, Mary Banks, Dylan Tesreau, Elvina Deck, Stacey Tesreau, Art and Carol Miserocchi, Richard Dulinski, Wilma Laird, Kathy Barker, Pete Deck, Tonia Cummings, Major Puckett, Michael Deck, Rita Deck, and Beverly Dulinsky and Exhibits 1-53, photos of Carman and his family; and to call a qualified expert, such as Dr. Surratt, to explain the significance of this evidence because Carman was denied his right to effective assistance of counsel (U.S. Const., Amends. 6 and 14), in that counsel failed to talk to many witnesses, and waited until trial to briefly speak to others, thus, she could not make reasonable, informed decisions about who to call and what evidence to present, and the motion court applied the wrong standard for finding prejudice, that the outcome of the trial would have been different, rather than a reasonable probability sufficient to undermine confidence in the outcome. Applying the appropriate standard, Carman was prejudiced as the jury never heard about how Carman's mother beat and hit him during his infancy through his teens, how his mother's boyfriends abused him, how Carman and his siblings were sexually abused when they were young children, how Carman was left without food when he was an infant causing him to be sick and dehydrated, and the many details of his horrible childhood, filled with extreme physical, sexual and emotional abuse, and neglect and

how that impacted him. Had the jury heard this evidence there is a reasonable probability that they would have sentenced Carman to life, rather than death.

Williams v. Taylor, 120 S.Ct. 1495 (2000);

Ford v. Georgia, 498 U.S. 411 (1991);

State v. Harris, 870 S.W.2d 798 (Mo. banc 1994);

State v. Morrow, 21 S.W.3d 819 (Mo. banc 2000);

U.S. Const., Amends. VI and XIV; and

Rules 29.15 and 24.035.

II. Counsel Did Not Voir Dire Jurors on Mitigation

The motion court clearly erred in denying Carman's claim regarding counsel's failure to adequately voir dire jurors on mitigation because the inadequate voir dire denied him his rights to due process, a fair trial, effective assistance of counsel and to be free from cruel and unusual punishment (U.S. Const., Amends. 5,6,8,14) in that counsel failed to explain mitigation and question jurors about whether they could consider mitigating circumstances and Carman was prejudiced as three jurors cried during the victims' son's testimony, showing a real probability that their sentence of death was based on emotion, not the evidence and the law; the jurors' notes revealed that they did not understand what mitigation meant; and the jurors did not receive accurate instructions on mitigation, explaining that they *shall* consider mitigation and need not be unanimous.

State v. Clark, 981 S.W.2d 143 (Mo. banc 1988);

Presley v. State, 750 S.W.2d 602 (Mo. App., S.D. 1988);

State v. Goff, 694 N.E.2d 916 (Ohio 1998);

State v. Goodwin, 703 N.E.2d 1251 (Ohio 1999); and

U.S. Const., Amends. V, VI, VIII, and XIV.

III., IV., VI.

Counsel's Ineffective Assistance Should Be Reviewed Under the *Strickland* Standard, Which Is Different Than the Standard for Finding Plain Error

The motion court clearly erred in denying the claims of counsel's ineffectiveness for submitting a mitigation instruction that was contrary to MAI-CR3d 313.44(a) (Point III.); failing to request an instruction defining mitigation when the jury expressed its confusion (Point IV.); and failing to object to the prosecutor's improper argument (Point VI.); because the right to effective assistance of counsel (U.S. Const., Amends. 6 and 14), should be decided under the *Strickland* standard for prejudice -- whether a reasonable probability exits that the outcome would have been different, sufficient to undermine confidence in the outcome -- rather than the standard for plain error, a manifest injustice which requires that the error actually affected the jury's verdict.

Strickland v. Washington, 466 U.S. 668 (1984);

Kyles v.Whitley, 514 U.S. 419 (1995);

Sidebottom v. State, 781 S.W.2d 791 (Mo. banc 1989);

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995);

U.S. Const., Amends. VI and XIV; and

Rule 29.15.

ARGUMENTS

I. Counsel Did Not Investigate and Present Mitigation

The motion court clearly erred in denying the claim of counsel's ineffectiveness for failing to investigate and to present the circumstances of Carman's life history through witnesses, David Hood, Mary Banks, Dylan Tesreau, Elvina Deck, Stacey Tesreau, Art and Carol Miserocchi, Richard Dulinski, Wilma Laird, Kathy Barker, Pete Deck, Tonia Cummings, Major Puckett, Michael Deck, Rita Deck, and Beverly Dulinsky and Exhibits 1-53, photos of Carman and his family; and to call a qualified expert, such as Dr. Surratt, to explain the significance of this evidence because Carman was denied his right to effective assistance of counsel (U.S. Const., Amends. 6 and 14), in that counsel failed to talk to many witnesses, and waited until trial to briefly speak to others, thus, she could not make reasonable, informed decisions about who to call and what evidence to present, and the motion court applied the wrong standard for finding prejudice, that the outcome of the trial would have been different, rather than a reasonable probability sufficient to undermine confidence in the outcome. Applying the appropriate standard, Carman was prejudiced as the jury never heard about how Carman's mother beat and hit him during his infancy through his teens, how his mother's boyfriends abused him, how Carman and his siblings were sexually abused when they were young children, how Carman was left without food when he was an infant causing him to be sick and dehydrated, and the many details of his horrible

childhood, filled with extreme physical, sexual and emotional abuse, and neglect and how that impacted him. Had the jury heard this evidence there is a reasonable probability that they would have sentenced Carman to life, rather than death.

Even though the motion court granted a hearing on all issues, the State suggests that this Court should not review Mr. Deck's claim that counsel was ineffective in failing to thoroughly investigate and present mitigation. Rather, the State urges this Court to deny relief on procedural grounds. According to the State, Claim 8 (A) is inadequately pled (Resp. Br. at 37-39). In support of this argument the State cites *State v. Morrow*, 21 S.W.3d 819, 823-24 (Mo. banc 2000); *State v. Brooks*, 960 S.W.2d 479, 497-98 (Mo. banc 1997); *White v. State*, 939 S.W.2d 887, 896 (Mo. banc 1997); and *Hatcher v. State*, 4 S.W.3d 145, 150-51 (Mo. App. S.D. 1999). In each of these cases, the issue was whether the motion court clearly erred in denying the Rule 29.15 motion without an evidentiary hearing. Thus, it was appropriate for the reviewing court to determine the adequacy of the pleadings. Here, in contrast, the motion court granted a hearing and decided all the claims on the merits.

Significantly, the State has not pointed to any facts adduced or witnesses called at the evidentiary hearing, or raised on appeal, that were not pled in the amended motion. Thus, the case is not like any of those cited by the State (Resp. Br. at 38). In *State v. Clay*, 975 S.W.2d 121, 141-42 (Mo. banc 1998), this Court held any allegation *not raised* in a motion is waived on appeal. In *Belcher v. State*, 801 S.W.2d 372, 375 (Mo. App. E.D. 1990), the motion court did not clearly err in denying a 24.035 motion without an

evidentiary hearing. In *State v. Harris*, 870 S.W.2d 798, 815 (Mo. banc 1994) the pleading was deficient; it did not identify what mental disease or defect Harris had or what witness would testify about the defect. Nevertheless, this Court reviewed the defective pleading, since the motion court heard evidence on the claim. *Id.* at 815. So too should this Court review Mr. Deck's claims, since the trial court granted a hearing and issued findings on all issues.

Further, this Court, not a federal court, should decide the claims on their merits. In *Morrow, supra* , this Court first announced stringent pleading requirements. *Morrow* was decided on June 13, 2000, and modified on August 1, 2000, well after Mr. Deck's amended motion was filed. Thus, the state procedural rule, invoked by the State, was not firmly established, regularly followed, and readily ascertained at the time Mr. Deck's motion was filed. *White v. Bowersox*, 206 F.3d 776, 780 (8th Cir. 2000), citing *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). As such, a procedural bar will not preclude review on the merits in federal court. *Id.* This Court should decide the claims, since the motion court granted a hearing. *Harris, supra*.

Once the merits are reached, this Court should find that trial counsel was ineffective in failing to thoroughly investigate and present mitigation. Two striking omissions are found in the State's brief. First, the State fails to address *Williams v. Taylor*, 120 S.Ct. 1495 (2000), even though the Court held that counsel was ineffective for failing to investigate and present mitigating evidence. Secondly, the State never mentions the motion court's findings and conclusions, even though the issue before this Court, is whether those findings and conclusions are "clearly erroneous."

Williams v. Taylor

Williams establishes why Mr. Deck is entitled to relief. Williams robbed and killed his victim. *Williams v. Taylor*, *supra* at 1499. However, unlike Mr. Deck, the charged offense was not Williams' first violent offense, nor his last. In 1976, Williams had been convicted of armed robbery, and six years later, he was convicted of grand larceny. *Id*. at 1500. When he confessed to the murder, he revealed that he also had assaulted two elderly victims after the murder. *Id*. In December 1985, he set a fire outside a house and then attacked and robbed the victim. *Id.* Three months later, Williams brutally assaulted an elderly woman, leaving her in a vegetative state; she was not expected to recover. *Id.* Williams also stole two cars. *Id.* Finally, he set fire in jail, while awaiting trial for the murder. *Id.* Two experts found that Williams would pose a continuing threat to society. *Id.*

Williams presented three live witnesses at the penalty phase and a taped excerpt from a psychiatrist. *Id*. Williams' mother and two neighbors testified on Williams' behalf. *Id.* They described Williams as a "nice boy" who was not violent. *Id.* The psychiatrist revealed that during one of his earlier robberies, Williams said he had taken the bullets out of the gun so he would not injure anyone. *Id*. Counsel's strategy was to focus on Williams' voluntary confession -- Williams had initiated contact and turned himself in for four crimes that would not have been solved otherwise. *Id.*

The Supreme Court found Williams' counsel constitutionally ineffective. *Id.* at 1514-16. Presenting some evidence was not sufficient, because counsel failed to conduct a *thorough* investigation of Williams' background. *Id.* at 1515. Like Mr. Deck's

counsel, Williams' counsel talked to one of the testifying witnesses for the first time during trial. *Id.* at 1514. Counsel did not present extensive records of Williams' nightmarish childhood. *Id.* His parents were imprisoned for criminal neglect of Williams. *Id.* His father repeatedly beat him. *Id*. Social services took custody of Williams for two years, placed him in one abusive foster home, and returned him to his parents when they were released from prison. *Id.*

Counsel also failed to present evidence of Williams' borderline mental retardation and that he only finished Sixth grade. *Id.* Counsel ignored prison records that showed Williams helped crack a prison ring and returned a guard's missing wallet. *Id*. A guard thought he was not likely to act in a violent or dangerous way. *Id.* A certified public accountant, who had volunteered in a prison ministry, thought Williams would thrive in a structured regimented environment. *Id.*

In finding counsel ineffective, the Supreme Court recognized that much of the evidence counsel failed to present was not all good; it contained harmful information as well. *Id*. Juvenile records showed other offenses for larceny, pulling a false alarm and breaking and entering. *Id.* This harmful information did not justify omitting all the helpful mitigation. *Id*. Neither did counsel's tactical decision to focus on Williams' voluntary confession. *Id*. In finding prejudice, the Court looked not only at the omitted evidence, but also the evidence adduced at trial. *Id.* at 1515. The Court criticized the lower Court's review of each piece of evidence in isolation. *Id*. Since counsel had failed to thoroughly investigate, and the jury might have voted for life with such evidence, the

Court found counsel ineffective under the Sixth and Fourteenth Amendments. *Id*. at 1515-16.

The State's refusal to discuss *Williams* is telling. Like Williams' counsel, Mr. Deck's counsel failed to thoroughly investigate. Counsel admitted that she could not voir dire on mitigation, because she was not sure what the defense witnesses were going to say (H.Tr.183). She talked to two of her four witnesses for the first time during the trial (H.Tr.133-34,135,211; M.Deck,13-19; Puckett,36-40,41). Her investigator and co-counsel had contacted them briefly, but both were assured they would be thoroughly interviewed before they testified (H.Tr.133-34,135,211). Both were dissatisfied; counsel hurriedly met with them during breaks during the trial (M.Deck,15-19;Puckett,36-40,44). These were the breaks that counsel complained were too short and made her feel rushed one night (H.Tr.186-87).

As in *Williams*, counsel's failure to *thoroughly* investigate resulted in the jury not hearing evidence of Mr. Deck's nightmarish childhood. The jurors never knew that he was starved as an infant (Banks,8-12). The helpless, limp 3-week-old baby had no formula for a day, because his parents were more interested in drinking and singing at bars, than taking care of him. *Id.* When they were around, they put beer in his bottle to sedate him and saw nothing wrong with it (Barker,108). His mother repeatedly beat him, as did the strange men with whom she put him in contact (Laird,16-18; B. Dulinski,26-27,38-42,45; M. Deck,50-53; E.Deck,9; Cummings,40-43). When just a little boy, he was sexually molested. He watched as his mother had sex in front of him and his siblings (Surratt,46-48,67-69; Cummings,32-33,36-37). His mother often took Carman and his

siblings to bars and left them unattended to run around in parking lots, smoke cigarettes, and watch as she had sex with men in parked cars (Hood,7,9-10; Laird,15,21-22; Banks,13; Barker,42; M.Deck,25-26). Sometimes she just left them alone or with people unfit to care for them, like their epileptic uncle who had seizures and who molested his niece (Laird,8,13; Banks,29; E. Deck,13,37; P. Deck,35; Cummings,21-24). Counsel knew about none of this mitigation, because like Williams' counsel, she failed to thoroughly investigate (H.Tr.94-110).

Had counsel known about this evidence, she would have presented much of it. *Id*. Thus, this case is unlike *State v. Taylor*, 929 S.W.2d 209, 225 (Mo. banc 1996) and *State v. Clay, supra* at 145, cited by the State (Resp. Br. at 42), where counsel thoroughly investigated and then decided not to present mitigation.

Motion Court's Findings

The State spends much time reviewing evidence, but never addresses the motion court's findings about that evidence. Perhaps the State wants to ignore the findings because they are clearly erroneous and must be reversed. The motion court reviewed each witness called at the 29.15 separately (A-2 - A-5) and concluded that Mr. Deck had not shown the same outcome would have been different (A-5 - A-6). *Williams* discussed this very approach and criticized it. *Williams, supra* at 1515. The omitted evidence must be viewed together, not in isolation. *Id.* Further, in reviewing for prejudice, courts must look at all the omitted evidence and the evidence actually adduced at trial. *Id.*

Applying the appropriate standard in *Williams*, Mr. Deck has shown a reasonable probability that had the jury heard this additional evidence, it could have affected the

balance of aggravation and mitigation. The jury deliberated a long time (Tr.951-52). Jurors were concerned about mitigation and how to define it (D.L.F.262-63). At one point, the jury penned a note saying they could not agree upon punishment (D.L.F.261). The jury never heard the horrific details of how Carman was neglected as an infant. They did not know that he was repeatedly beaten and sexually molested from the time that he was a toddler to his teens. They knew nothing about his mother being a prostitute and how she had sex in front of her children. The jury never had a chance to weigh all this mitigation with the State's aggravation. Had the jury heard this additional mitigation, they jury might have returned a life sentence. This Court cannot be confident in the outcome at trial; a new penalty phase should result.

II. Counsel Did Not Voir Dire Jurors on Mitigation

The motion court clearly erred in denying Carman's claim regarding counsel's failure to adequately voir dire jurors on mitigation because the inadequate voir dire denied him his rights to due process, a fair trial, effective assistance of counsel and to be free from cruel and unusual punishment (U.S. Const., Amends. 5,6,8,14) in that counsel failed to explain mitigation and question jurors about whether they could consider mitigating circumstances and Carman was prejudiced as three jurors cried during the victims' son's testimony, showing a real probability that their sentence of death was based on emotion, not the evidence and the law; the jurors' notes revealed that they did not understand what mitigation meant; and the jurors did not receive accurate instructions on mitigation, explaining that they *shall* consider mitigation and need not be unanimous.

Counsel failed to voir dire jurors on specific mitigation, because she was not sure what her witnesses were going to say (H.Tr.183). She did not discuss the term "mitigation" with the first two panels, whose venirepersons made up the majority of Mr. Deck's jury (Tr.451-52,485). Counsel's failures were not strategic, but were a result of being unprepared. She admitted that she changed the way she voir dired after Mr. Deck's trial, because it was apparent the jurors did not understand what mitigation meant (H.Tr. 184).

Nonetheless, the State would have this Court deny relief because Ohio's Supreme Court does not require counsel to voir dire on mitigation (Resp.Br. at 63). While the

Ohio Supreme Court's cases *State v. Goff*, 694 N.E.2d 916, 929 (Ohio 1998), *State v. Goodwin*, 703 N.E.2d 1251, 1256 (Ohio 1999) found counsel was not ineffective for failing to voir dire on mitigation, they are not helpful to the resolution of Mr. Deck's case. In *Goodwin*, *supra* at 1256, the defense presented no evidence at the penalty phase hearing. Thus, it was not surprising, let alone unreasonable, for counsel to choose to conduct no voir dire about mitigation. In *Goff*, *supra* at 925, the trial court allowed individual voir dire where the parties questioned jurors extensively on the death penalty.

Here, in contrast, counsel knew the case centered on what penalty to impose and jurors' understanding of mitigation was critical to the defense (H.Tr.166,183-84). Counsel made no reasoned decision not to voir dire on mitigation, she simply could not, since she did not know what her witnesses would say. She also defined mitigation and explained it with the 3rd and 4th panels (Tr.503,526), showing she had simply been negligent with the first two panels.

The State's suggestion that Mr. Deck must show a biased juror actually served on his jury (Resp. Br. at 64) does not withstand scrutiny. The State's reliance on *Presley v. State*, 750 S.W.2d 602, 607 (Mo. App. S.D. 1988) is misplaced. In *Presley*, the issue was whether counsel was ineffective for failing to strike for cause a biased juror. *Id*. Thus, Presley had to show that the biased juror actually served to prove prejudice. *Id.*

In contrast, Mr. Deck's claim is that counsel failed to voir dire on mitigation, a concept critical to her defense and necessary to determine whether jurors could be fair and impartial. Thus, his case is much more like *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1988) where the Court prohibited voir dire on the age of the three-year-old

victim. Without a thorough voir dire to investigate potential bias, the right to an impartial jury is meaningless. *Id*. at 148. To show prejudice, Clark requires a real probability of injury. *Id.*

Mr. Deck must show a reasonable probability that the outcome would be different, sufficient to undermine confidence in the outcome. The jury's own words provide prejudice. They did not understand mitigation, asking for a definition and then a dictionary (D.L.F.262-63). At one point, they penned a note saying they could not agree upon punishment (D.L.F.261). They deliberated more than five hours (Tr.951-52). Under these facts, one's confidence in the outcome must be undermined. A new penalty phase must result.

III., IV., VI.

Counsel's Ineffective Assistance Should Be Reviewed Under the *Strickland* Standard, Which Is Different Than the Standard for Finding Plain Error

The motion court clearly erred in denying the claims of counsel's ineffectiveness for submitting a mitigation instruction that was contrary to MAI-CR3d 313.44(a) (Point III.); failing to request an instruction defining mitigation when the jury expressed its confusion (Point IV.); and failing to object to the prosecutor's improper argument (Point VI.); because the right to effective assistance of counsel (U.S. Const., Amends. 6 and 14), should be decided under the *Strickland* standard for prejudice -- whether a reasonable probability exits that the outcome would have been different, sufficient to undermine confidence in the outcome -- rather than the standard for plain error, a manifest injustice which requires that the error actually affected the jury's verdict.

Critical to this Court's review of claims III., IV., and VI. is the question of what standard applies in assessing prejudice. The State claims that "[t]he finding of no manifest injustice under the 'plain error' standard on direct appeal serves to establish a finding of no prejudice under the test of ineffective assistance of counsel under *Strickland v. Washington*," citing *Sidebottom v. State*, 781 S.W.2d 791, 796-97 (Mo. banc 1989); *Clemmons v. State*, 785 S.W.2d 524, 530 (Mo. banc 1990); *State v. Kelley*, 953 S.W.2d 73, 91, 93 (Mo. App. S.D. 1997); *State v. Williams*, 945 S.W.2d 575, 583 (Mo. App. W.D. 1997). However, a careful examination of this Court's opinions in *Sidebottom* and

Clemmons, as well as subsequent decisions, shows the standard is not the same. The Courts of Appeals decisions to the contrary misread this Court's opinions and are in conflict with decisions of the United States Supreme Court.

In *Strickland v. Washington,* 466 U.S. 668 (1984), the Court decided the standard for reviewing claims of ineffective assistance of counsel. The standard has two parts: performance and prejudice. *Id*. The Court spent much time discussing the prejudice prong and specifically rejected an outcome-determinative standard. *Id.* at 692- 694. "We believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Id*. at 693. Such a standard was not quite appropriate, because an ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable. *Id.* The appropriate standard must be lower. Thus, the Court adopted a test for prejudice with roots in the test for materiality of exculpatory information not disclosed to the defense. *Id*. at 694, citing *United States v. Agurs*, 427 U.S. 97, at 104, 112-13 (1976). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermined confidence in the outcome." *Strickland, supra* at 694.

Only five years after *Strickland*, this Court decided *Sidebottom, supra*, and appropriately applied the *Strickland* standard of prejudice. *Id.* at 796. At issue was defense counsel's failure to object to Exhibit 3, a prisoner data sheet that referred to a rape and burglary on one small box. *Id.* This reference came in the midst of 15 other

pages. *Id.* The jury asked if the defendant had been convicted of rape and burglary or just charged with the offenses which could not be considered in guilt. *Id.* The trial court instructed the jury not to consider the entries in arriving at a verdict. *Id.*

Given, these facts, and the law, the Court found that "the *bases* for finding no manifest injustice on direct appeal serve to establish no prejudice under the Strickland test." *Id*. (emphasis added). The Court emphasized that the trial court directed the jury to disregard the references, the prosecutor made no attempt to utilized the unrelated crimes, through argument or otherwise, and the prosecutor had not consciously tried to inject the improper evidence. *Id.* at 796-97. Applying, the standard of a "reasonable probability that the result would have been different," this Court found no prejudice. *Id*. at 797.

Next, this Court decided *Clemmons, supra*. Again, this Court applied the *Strickland* standard for prejudice and noted that such prejudice need only undermine confidence in the outcome. *Clemmons*, 785 S.W.2d at 527. Like *Sidebottom,* the Court found "that the *basis* for this Court's finding of no manifest injustice on direct appeal served to establish a finding of no prejudice under the *Strickland* test." *Id*. at 530.

Four years later, this Court decided *State v. Nolan,* 872 S.W.2d 99 (Mo. banc 1994). At issue in this consolidated appeal was whether a verdict director for attempted burglary that failed to specify the intended crime of the burglary was plain error. *Id.* at 103. For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury as to cause a manifest injustice or miscarriage of justice. *Id.* Such an inquiry is fact driven, but in the context of instructional error, one must prove that the error "affected the jury's verdict." *Id*. Nolan could not meet this

standard; the jury found that he intended to commit the crime and the prosecutor's argument that the intended crime was stealing was supported by the evidence. *Id*. Nolan had unlawfully entered the building containing valuables. *Id*. Since Nolan could not show the instructional error actually affected the jury's verdict, there was no plain error. *Id*.

Then, this Court turned to the issue of ineffective assistance for failing to object to the improper instruction and include the error in the motion for new trial. As with *Sidebottom* and *Clemmons*, the Court cited *Strickland* and the prejudice standard. *Nolan, supra* at 104. The Court concluded that "as in *Sidebottom*, the *basis* for no finding of manifest injustice defeats a finding of prejudice under *Strickland.*" *Id.* (emphasis added).

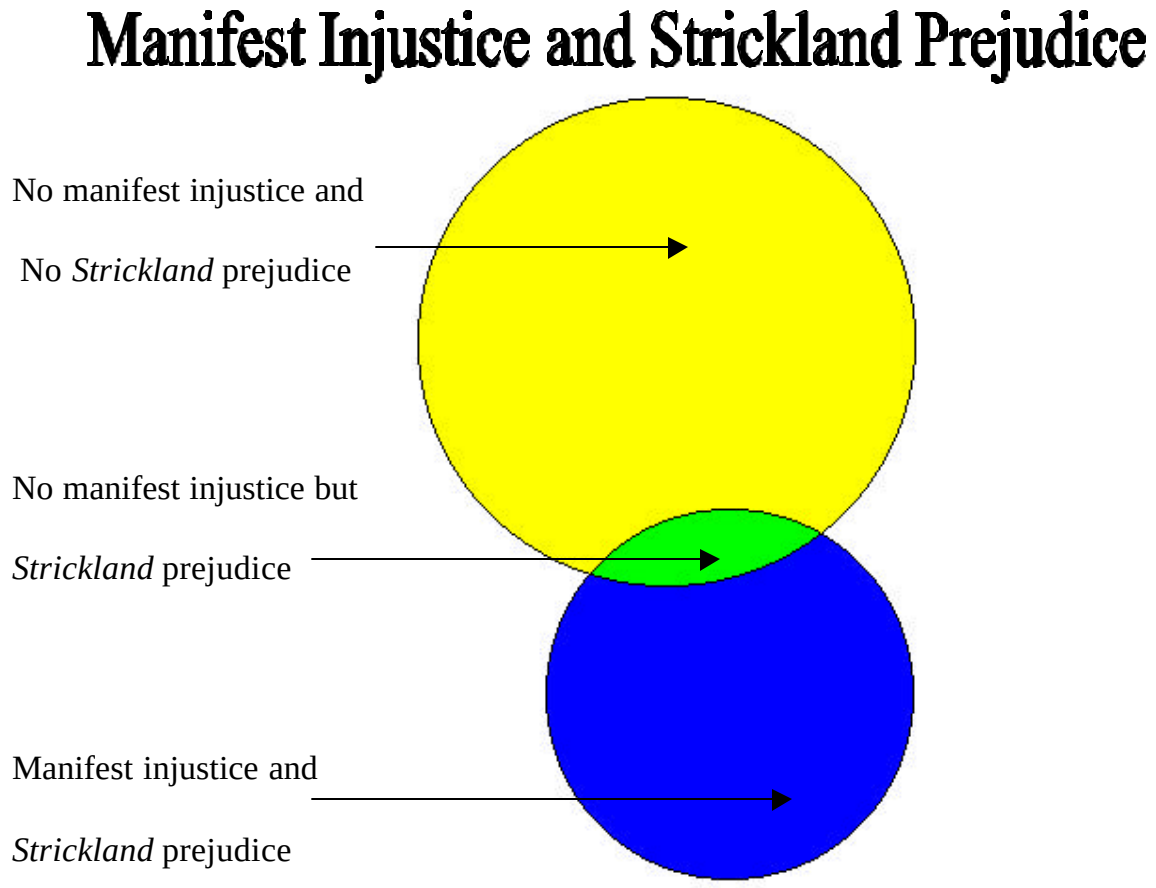
Rather than review the facts of each case as this Court has done, the State argues that a finding of no plain error forecloses any review under *Strickland*, under all circumstances. (Resp. Br. at 67). The state's argument is contrary to the plain language of the *Strickland* standard, and the plain error standard, requiring a showing that the error affected the outcome. The argument is also contrary to *Kyles v.Whitley*, 514 U.S. 419 (1995).

In *Kyles*, *supra* at 433-35, the Court discussed the standard for prejudice adopted in both *Strickland* and *United States v. Bagley*, 473 U.S. 667 (1985), a reasonable probability that the outcome would be different. Citing *Strickland*, *supra* at 693, the Court said "[w]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Kyles, supra* at 434. The

"touchstone" in the analysis is a "reasonable probability" of a different result, and "the adjective is important." *Id*.

In contrast, when reviewing for plain error, this Court requires a showing that the error altered the outcome. *State v. Deck*, 994 S.W.2d 527, 540 (Mo. banc 1999). "For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error *affected* the verdict." *Id.* (emphasis added). Similarly, improper closing arguments are rarely reviewed for plain error. *Id*. at 544. A defendant must make a substantial showing that manifest injustice will result if relief is not granted. *Id*. Errors must have a "decisive effect" on the jury's verdict to warrant plain error relief. *Sidebottom, supra* at 920.

Thus, the standards for plain error and *Strickland* prejudice are very different, but as *Sidebottom, Clemmons,* and *Nolan* show, many allegations of error will not meet either standard. The very reasons that an error does not rise to the level of plain error will also often establish that no *Strickland* prejudice exists.



Thus, such errors could fall into three categories. The vast majority of errors will not be plain error and will not prejudicial under *Strickland. See, e.g*. *Sidebottom*, *Clemmons*, and *Nolan.* Some errors will be so prejudicial that they rise to plain error and satisfy the *Strickland* standard. However, a small number of errors might not reach the level of plain error - - one cannot show a decisive effect on a jury's verdict - - but they are prejudicial enough to undermine confidence in the outcome of the proceedings. In essence, a defendant cannot show an error *would* have changed the verdict, but it *could* have.

An example of such a case is *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995). In *Storey*, this Court did not find plain error in the prosecutor's guilt-phase closing arguments. *Id.* at 897-98. Storey also asserted that the penalty phase closing arguments constituted plain error and counsel was ineffective for failing to object to the improper argument. *Id.* at 900-903. This Court reversed, finding counsel ineffective for failing to object. *Id.* The dissent disagreed with the finding of ineffectiveness, but stated: "I applaud the majority's refusal to exercise plain error review of closing argument in this case. 'Plain error will seldom be found in unobjected closing argument' (quoting *State v. Kempker*, 824 S.W.2d 909, 911 (Mo. banc 1992)) . . . Refusal to conduct plain error review does not end the discussion, as the majority's conclusion demonstrates. Rule 29.15 permits a convicted murderer to argue that his trial counsel failed to represent him effectively, claiming a violation of the Sixth Amendment's right to counsel and due process under the Fourteenth Amendment." *Id.* at 903 (J. Robertson, concurring in part and dissenting in part).

However, contrary to *Storey*, the refusal to find plain error has ended the discussion of many claims of ineffective assistance of counsel. *Williams*, *supra* at 583; *State v. Clark*, 913 S.W.2d 399, 406 (Mo. App. W.D. 1996); and *State v. Davis*, 936 S.W.2d 838, 841-42 (Mo. App. W.D. 1996). These cases have misread this Court's opinions and have misapplied the *Strickland* standard. They equate *Strickland* prejudice and manifest injustice.

As in *Storey*, Mr. Deck did not establish plain error on direct appeal, but he can show that his counsel was ineffective.

Mitigating Circumstance Instruction

Counsel admitted the gravity of her mistake in submitting a defense instruction on mitigation that omitted two required paragraphs (H.Tr.164-65). Mr. Deck's jury never received the final language of MAI-CR3d 313.44(A), that told them they *must* consider mitigation and need not be unanimous. Counsel recognized that this language was *critical* to her defense (H.Tr.166). She knew that the case would turn on mitigation, not guilt or innocence (H.Tr.198). Further, her argument could not overcome the faulty instructions, since the court told jurors that arguments are not evidence and the law is contained in the instructions (D.L.F.243,257). MAI-CR3d 302.02 and 313.49. The jury deliberated for five and one-half hours before deciding punishment (Tr.951-52). The jurors were concerned about what was to be considered mitigating - they requested a definition and then a dictionary (D.L.F.262-63). Under these facts, this Court cannot be confident that, had the jury been directed that they must consider mitigation and need not be unanimous, the outcome would have been the same.

Defining Mitigation

Here, the jurors were confused by the concept of mitigation (D.L.F.262). This was not a minor point of law. Rather, mitigation was the critical concept that would determine whether Carman would live or die. Yet counsel did not ask for the trial court to define mitigation. Mr. Deck was prejudiced. The jury struggled with their penalty deliberation for more than five hours (Tr.951-52) and, at one point, someone penned a note saying they could not reach a verdict (D.L.F.261).

The evaluation of the aggravating and the mitigating evidence offered during the penalty phase is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt. *State v. Storey*, 986 S.W.2d 462,464 (Mo.banc1999). The jury is never required to impose a sentence of death. *Id.* In light of this discretion, proper and complete instructions on mitigation could have changed the balance of aggravation and mitigation. Given the length of their deliberations and their confusion, had it been properly instructed, the jury could well have imposed a life sentence.

Improper Closing Argument

Counsel was ineffective in failing to object to improper argument, asking the jurors to think about waiting for ten minutes while someone pointed a gun to their head (Tr. 948). Counsel also failed to object when the prosecutor pointed to the victim's family and said "these folks want justice." (Tr.946). The inflammatory argument was not limited to these two incidents. Rather, the entire closing penalty phase argument compared the victims and Carman and their respective worth (Tr.946-50).

Counsel acknowledged the "gun to the head" argument was improper and had no reason for not objecting (H.Tr.167-68). As for "these folks want justice," counsel could not say whether she should have objected and thought it could go either way (H.Tr.168). She did not recognize the "weighing lives" basis for an objection (H.Tr.168-69).

The arguments were prejudicial – the personalization was designed to arouse the jurors' fears and encouraged them to decide the case on their emotions. The arguments injected emotion and caprice and denied Carman a fair trial. The jury deliberated for

more than five hours (Tr.951-52). The closing argument was brief, with the rebuttal spanning only 4 and 1/2 pages (Tr.929-34,946-50). The improper argument making up the core of the closing. *Id.* Nearly all of the argument compared the victims and Carman. *Id*. Like *Storey*, this Court should find ineffectiveness in failing to object and reverse for a new penalty phase.

CONCLUSION

Based on the arguments of this and Mr. Deck's original brief in Points I-IV, VI, Mr. Deck requests this Court reverse and remand for a new penalty phase, Point VII, reverse and remand for a new trial and Points V and VIII, reverse and remand for additional 29.15 proceedings, sufficient to conduct a full investigation and an opportunity to present evidence regarding all the issues in the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2001, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, Missouri 65102.

_____
Melinda K. Pendergraph

CERTIFICATE OF COMPLIANCE

I, Melinda K. Pendergraph, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 6,237 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

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Melinda K. Pendergraph